(2)

No. 09-1184

IN THE

Supreme Court of the United States

MICHAEL STRATECHUK,

Petitioner,

v.

BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, in his official capacity as board president for the School District; and PETER P. HOROSHAK, in his official Capacity as Superintendent for the School District,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

The Petitioner is Michael Stratechuk ("Petitioner").

The Respondents are Board of Education, South Orange-Maplewood School District ("School District" or "District"); Brian F. O'Leary, in his official capacity as board president for the School District; and Peter P. Horoshak, in his official capacity as Superintendent for the School District ("Respondents").

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDINGS	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
OPINIONS BELOW	1
INTRODUCTION	1
STATEMENT OF THE CASE	3
A. Policy 2270	3
B. The Decisions Below	7
REASONS FOR DENYING THE PETITION	11
POINT I	
THE LIMITED DECISION BELOW DOES NOT RAISE IMPORTANT ISSUES WARRANTING REVIEW BY THIS COURT	11
POINT II	
THE PANEL'S DECISION DOES NOT CONFLICT WITH DECISIONS FROM THIS COURT OR OTHER CIRCUIT COURTS	14

Contents

Page

POINT III

POLICY 2270, AS WRITTEN AND ENFORCED, IS NEUTRAL TOWARD AND DOES NOT DISFAVOR RELIGION 16

POINT IV

THIS CASE, REPRESENTING AS IT DOES A MODEL OF RELIGIOUS NEUTRALITY AND BALANCING OF FIRST AMENDMENT CONCERNS, IS NOT AN APPROPRIATE VEHICLE FOR CLARIFYING THIS COURT'S FIRST AMENDMENT JURISPRUDENCE 19

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

Cases

Bauchman v. W. High Sch.,
132 F.3d 542 (10th Cir. 1997) 15

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 14

Committee for Public Education & Religious Liberty v. Nyquist,
413 U.S. 756 (1973) 11, 18

County of Allegheny v. American Civil Liberties Union,
492 U.S. 573 (1989) 18

DeNooyer v. Livonia Pub. Schs.,
799 F.Supp. 744 (E.D. Mich. 1992) 15

Doe v. Duncanville Indep. Sch. Dist.,
70 F.3d 402 (5th Cir. 1995) 15

Edwards v. Aguillard,
482 U.S. 578 (1987) 8, 14, 16

Epperson v. Arkansas,
393 U.S. 97 (1968) 14, 18

Florey v. Sioux Falls Sch. Dist.,
619 F.2d 1311 (8th Cir. 1980) 15

Cited Authorities

Page

Good News Club v. Milford Central School,
533 U.S. 98 (2001) 13

Lemon v. Kurtzman,
403 U.S. 602 (1971) 7, 8, 9, 10

Lundberg v. West Monona Community Sch. Dist.,
731 F. Supp. 331 (N.D. Iowa 1989) 16

Lynch v. Donnelly,
465 U.S. 668 (1984) 16

McCreary County v. ACLU,
545 U.S. 844 (2005) 8, 16

Nurre v. Whitehead,
580 F.3d 1087 (9th Cir. 2009) 11, 13

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) 10, 14

Smith v. Bd of Sch. Comm'rs,
837 F.2d 684 (11th Cir. 1987) 13

Stein v. Oshinsky,
348 F.2d 999 (2nd Cir. 1965) 16

Walz v. Egg Harbor Twp. Bd. of Educ.,
342 F.3d 271 (3d Cir. 2003) 15

OPINIONS BELOW

The Third Circuit Opinion App. 1a, is reported at 587 F.3d 597 (3rd Cir. 2009). The District Court Opinion, App. 31a, is reported at 577 F. Supp. 2d 731 (D.N.J. 2008).

INTRODUCTION

The Petition for a Writ of *Certiorari* repeatedly mischaracterizes the ban on celebratory religious music imposed under School Board Policy 2270 and misstates the constitutional issue before the lower courts. The central issue was not whether the performance of traditional Christmas music in the public schools of this nation is constitutionally prohibited. Rather, the question addressed was whether the School District possessed the discretion to ban the celebration of religious holidays in its school system, by prohibiting the performance of music that is clearly associated with the celebration of religious holidays — specifically, Christmas and Hanukkah. Both the District Court and the Third Circuit affirmed the right of the School District to determine what types of religious music could be permitted at school-sponsored concerts, finding that the District possessed wide latitude to regulate matters relating to the school curriculum.

The facts do not support Petitioner's claim that Policy 2270 is hostile toward religion. The Policy, as written and interpreted, is constitutionally neutral. The performing of celebratory religious music at school-sponsored events is prohibited because such performances: (1) are not necessary to achieve the

specific goals of the music curriculum; (2) could be perceived by an objective reasonable observer as an overt endorsement of religion or an improper focus on religious holidays; and (3) inevitably offends certain participants and/or audience members. The ban on religious music performances here is very narrow, far more modest than the sweeping prohibitions described by Petitioner. Policy 2270 permits the study of religious music as part of the curriculum; the performance of religious music (including celebratory religious music) in the classroom; and the performance of religious music at school-sponsored concerts, as long as the music pieces are reasonably related to the curriculum and are not directly associated with the celebration of religious holidays.

Petitioner, in essence, contends that his children have a constitutional right to celebrate Christmas at year-end concerts in the South Orange-Maplewood school system. Stratechuk argues that because there had been a longstanding tradition of singing Christmas songs at holiday concerts in the District, the practice is constitutionally protected and the school board may not change it. As the Third Circuit noted, no decision of this Court or any lower federal court has ever held that the First Amendment mandates that traditional Christmas music be performed in year-end concerts at public schools in this country. App. 18a.

STATEMENT OF THE CASE

A. Policy 2270

This case involves a challenge to the School District's policy on "Religion in the Schools" (Policy 2270), which provides that religious music can only be performed at school-sponsored assemblies and events if the music achieves specific goals of the music curriculum and does not celebrate religious holidays. The Policy further provides that music programs, prepared or presented by student groups as an outcome of the curriculum, shall not have a religious orientation or focus on religious holidays. Policy 2270, as adopted in 2001, read in pertinent part as follows:

> 1. Religious holidays are not to be celebrated in the schools, except in the form of the secular nature of that holiday. However, opportunities to learn about cultural and religious traditions should be provided within the framework of the curriculum. Information about religious and cultural holidays and traditions, focusing on how and when they are celebrated, their origins and histories may be part of this instruction.
>
> 2. In planning school activities related to the teaching about religious holidays or themes, special effort must be made to ensure the activity is not devotional and that pupils of all faiths and beliefs can join without feeling they are betraying their own faith or beliefs.

> 3. Decorations with religious significance are not permitted.
>
> 4. Religious music, like any other music, can only be used if it achieves specific goals of the music curriculum.
>
> a. Music programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays.

In or about December 2003, a parent complained to school officials about her child having to practice Christmas music in preparation for an upcoming holiday concert. That complaint led to a review of the District's interpretation and enforcement of Policy 2270. The District subsequently determined that the performance of music celebrating religious holidays during curricular and co-curricular events, such as year-end holiday concerts, was not necessary to achieve specific goals of the music curriculum and could be perceived as an overt endorsement of religion and/or an improper focus on certain religious holidays. School officials subsequently took steps to remind the music department staff of the Policy and that it was to be interpreted and enforced as written. In October 2004, Supervisor of Fine Arts, Nicholas Santoro, issued a memo advising the staff, consistent with the express language of the Policy, that religious music associated with the celebration of religious holidays would no longer be permitted at school-sponsored concerts.

Notwithstanding Petitioner's claim to the contrary, there is no competent evidence in the record supporting the contention that "the challenged policy is detrimental to a comprehensive music program and undermines sound educational goals and principles." In support of his claim, Petitioner relies principally upon the music faculty's reaction to the reinterpretation of Policy 2270, and to statements attributed to music teachers Barbara Eames and Bill Cook. Petition at 3. As the Third Circuit noted, however, the change in the interpretation of Policy 2270 was misunderstood by members of the music faculty. App. 9a-10a. Addressing a claim by Mrs. Eames that the reinterpreted Policy affected her ability to teach music in the classroom, the Court noted that Ms. Eames acknowledged at her deposition that she had not removed any Christmas or Hanukkah songs from her classroom curriculum. App. 10a. The panel also noted that Mr. Cook had acknowledged at his deposition that Policy 2270 "'didn't prohibit all religious music' in performances, only 'music based on . . . or themes consistent with pieces commonly associated with a holiday at the time of the holiday.'" App. 9a.

Further, a November 23, 2004 letter, purportedly sent on behalf of all music teachers in the District, reflected a fundamental misunderstanding about the scope of the change in the interpretation of Policy 2270. The music teachers who approved the letter were operating under the incorrect assumption that "student vocal and instrumental groups may not perform *any* religious music at December concerts." Petition at 8 (emphasis added). Policy 2270, in fact, does not ban the performance of religious music, but is limited to

prohibiting celebratory religious music at school-sponsored concerts.[1]

---

1. The following is a partial list of religious music performed at concerts under the challenged policy:

- Vivaldi's "Gloria *in Excelsis Deo*" ("*Cum Sancto Spiritu*") (which translates to "Glory be to God on high" and "The Holy Ghost").
- "*Concerto VIII, Fatto per la notte de natale*": By Arcangelo Corelli, known as the "Christmas Concerto."
- "*Wade in the Water*": Originally a Negro spiritual and since popularized by others; described as relating to both the Old and New Testaments, the verses describing the Israelites' escape from Egypt as per Exodus: 14 and the chorus setting forth the text of John 5:4. *See* http://en.wikipedia. org/wiki/Wade_in_the_Water (accessed January 15, 2009).
- "*Waters of Babylon*": Actually "By the Waters of Babylon," music to the words of Psalm 137 ("By the waters of Babylon, there we sat and wept, when we remembered thee, O Zion."). *See http://cpdl.org/wiki/index.php/Psalm_*137 (accessed January 15, 2009).
- "*Agnus Dei/Cum Sanctis*": Both selections are parts of Mozart's famous "Requiem", literally translated as "Lamb Of God," a phrase originally referring to Jesus Christ, and "With the Saints."
- *Jubilate* (actually "Jubilate Deo"): By Michael Praetorius, a 16th century German composer. The text is from Psalm 100 and the title translates to "In the Lord Rejoicing." *See http://www.cpdl.org/wiki/index.php/ Psalm_100* (accessed January 15, 2009).

(Cont'd)

To summarize, religious music remains an integral part of the music curriculum and concerts in the South Orange-Maplewood school system. Not coincidentally, the controversy surrounding the misunderstood change in the District's Policy toward religious music has all but evaporated. Year-end concerts, replete with performances of sacred religious pieces (albeit non-celebratory), have gone on in the District for the last several years without apparent objection or controversy.[2]

B. The Decisions Below

The District Court granted Respondents' motion for summary judgment, finding that the challenged policy satisfied the three-pronged test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). App. 51a-68a. The District Court also rejected Stratechuk's alternative First Amendment claim, that "the interpretation of Policy 2270 violates his children's right to receive

(Cont'd)

- "*Ich will den Herrn Loben*": By Georg Philipp Telemann, translated as "I Want to Praise the Lord," the text in German of Psalm 34. *See* http://209.85.165.100/translate_c?hl=en&sl=de&u=http://www.labbe.de/liederbaum/index.asp%3Ft (accessed January 22, 2009).

2. In October 2005, well after plaintiff filed the original complaint, the School District amended Policy 2270 and adopted Regulation 2270, in order to clarify the District's current interpretation and enforcement of its policy regarding religion in the schools. These revisions, however, were not significant and did not result in a substantive change in the District's interpretation of Policy 2270.

information and ideas." App. 69a-74a. This alternative claim was not briefed as part of plaintiff's Petition and will not be discussed further.

In affirming, the Third Circuit agreed that the Policy was constitutional under the *Lemon* test. Addressing the "secular purpose" prong, the Third Circuit upheld the finding that the change in the School District's interpretation of Policy 2270 was motivated by a desire to avoid a potential Establishment Clause violation. Rejecting plaintiff's argument that the School District's stated secular purpose was a "sham," the Court noted that "the concerns that led to the October 2004 Memo were the very types of concerns underlying the Establishment Clause jurisprudence in this area, i.e., the need for government neutrality towards religious institutions and beliefs, *McCreary County*, 545 U.S. at 860, and the impressionability of young children, *Edwards*, 482 U.S. at 583-84." App. 19a. The panel added:

> The cases cited by Stratechuk all upheld the policy of the respective schools or school districts. That is far different from holding that the First Amendment compels a school district to permit religious holiday music or risk running afoul of the First Amendment. Stratechuk has offered no persuasive authority that the First Amendment prevents South Orange-Maplewood School District from formulating a policy that precludes performance of religious holiday music.

App. 18a. It further held that "'the Constitution does not require the School to promote religion to the constitutionally permitted maximum and its failure to do so does not make it anti-religious in any constitutionally significant way. School districts can determine how close to the 'Establishment Clause line' they wish to place themselves.'" App. 19a.

The Court rejected Stratechuk's argument that Policy 2270 amounted to unconstitutional disapproval of religion, describing it as "'based largely upon plaintiff's inaccurate factual contention that defendants' policy amounts to a ban on religious music in the school system.'" App. 19a (quoting Appellee's Brf. at 37). The Court observed that "it is clear that the policy, as interpreted, does not prevent — and the record shows that it has not in fact prevented — the teaching of religious holiday songs in the classroom or the performance of songs with religious content at the December concerts." App. 19a-20a.

Turning to the "effect" prong of the *Lemon* test, the Third Circuit found ample evidence supporting the District Court's finding that the revisions to Policy 2270 were neutral toward religion when viewed through the eyes of a true neutral observer. The District Court had noted that the revised policy permitted the inclusion of religious music as part of the curriculum when objectively presented and required "'[a]ccommodat[ion of] student-initiated expression[s] . . . which reflect their beliefs or non-beliefs about religious themes. . . . Moreover, Policy 2270 allows for the use of religious music, provided it achieves specific goals of the music curriculum.'" App. 21a.

The Third Circuit rejected Stratechuk's argument that student, faculty, parental and public opposition to the change in the Policy established that a reasonable observer would view the change as hostile toward religion. The Court correctly observed that the "constitutionality of a school board's policy toward religion cannot be decided by reference to popular opinion." App. 23a; *citing*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316-17 (2000).

The Third Circuit had no difficulty disposing of Stratechuk's argument that the revisions to Policy 2270 resulted in "excessive governmental entanglement" with religion — the third prong of the *Lemon* test. The Court saw little difference between the minimal oversight of music selections for year-end concerts and the decisions school districts must make each day in an effort to maintain neutrality toward religion. The Third Circuit recognized that "'[t]o conclude otherwise ignores the evidence and would undermine governmental efforts to comply with the Establishment Clause.'" App. 25a (quoting District Court decision, 577 F. Supp. 2d at 749).

At Stratechuk's urging, the Third Circuit also considered the constitutionality of the School District's change in its Policy under the "endorsement test," which some courts have interpreted as a modification to the *Lemon* test. The endorsement test, the Court noted, eliminates the entanglement prong and applies an "objective observer" analysis to the purpose and effect prong of the *Lemon* test. Citing its analysis of the "purpose" and "effect" analysis under the *Lemon* test, the Third Circuit easily concluded that the School District's policy "does not exhibit endorsement or hostility towards religion." App. 25a-26a.

REASONS FOR DENYING THE PETITION

POINT I

THE LIMITED DECISION BELOW DOES NOT RAISE IMPORTANT ISSUES WARRANTING REVIEW BY THIS COURT

Petitioner labors mightily to portray this case as one presenting issues of "exceptional public importance" that will "ensure the demise" of the "rich tradition[ ]" of celebrating Christmas, via religious music, in public schools" and "embolden those who use the Establishment Clause as a blunt instrument against religion to continue to do so." Petition at i-ii. The reality of this matter is quite different. The Court of Appeals opinion is far more modest in its impact and implications than Petitioner would have this Court believe. This case concerns a subset of the issue of the proper role of religion and, in particular, of religious music in public schools.[3] The subset is religious music that is explicitly related to and celebratory of a religious holiday rather than religion, or even religious music, generally. As noted earlier, religious music in quantity (and in exceptional quality) continues to be performed at school concerts and religion remains a part of the School District curriculum, both as to music and other subjects,

3. "[T]he relationship between religion and education" has been the source of "[m]ost of the [Establishment Clause] cases coming to this Court." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973). This Court has addressed the issue on many occasions, and most recently declined to do so in *Nurre v. Whitehead*, 580 F. 3d 1087 (9th Cir. 2009), *cert. denied* (2010).

where appropriate. All that has changed is that the School District's winter season concerts no longer contain holiday-oriented religious music as they had previously.

The issue presented and decided was not whether the Establishment Clause prohibited the performance of celebratory religious music but whether the School District had the discretion to reduce the religious content at concerts, i.e., to "determine how close to the 'Establishment Clause line' they wish[ed] to place themselves". App. 19a. Hewing to that limited issue and recognizing the School District's right to make such decisions, the Third Circuit's opinion is quite narrow in its scope and pronouncements. It contains no sweeping statement that the First Amendment required the School District to have taken the challenged actions, *i.e.*, that failure to do so would have been an Establishment Clause violation. Instead, the Court recognized the substantial difference between constitutional mandates and prohibitions on the one hand, and constitutionally permissible behavior on the other — the differences and considerable space between what government "may," "must," and "may not" do. App. 18a-19a.

The Court of Appeals recognized that "the Constitution does not require the School to promote religion to the constitutionally permitted maximum;" "its failure to do so does not make it anti-religious in any constitutionally significant way;" and school districts could "determine how close to the 'Establishment Clause line' they wish to place themselves." App. 19a. The Court's conclusion hearkened to this last point:

"Many decisions about how to best create an inclusive environment in public schools, such as those at issue here, are left to the sound discretion of the school authorities." App. 28a. *See, Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684, 689 (11th Cir. 1987) (courts must be cognizant of "the broad discretion given school boards in choosing the public school curriculum").

Finally, this case raises questions similar to those recently considered in *Nurre v. Whitehead*, 580 F. 3d 1087 (9th Cir. 2009), *cert. denied* (2010), but with salient differences that make the decision here far less constitutionally significant. In particular, the graduation ceremony in *Nurre*, via stipulation, constituted a "limited public forum" and the "question presented" focused on that fact.[4] In that setting, the petitioner argued in support of *certiorari*, that the State "must not discriminate against speech on the basis of viewpoint." *Good News Club v. Milford Central School*, 533 U. S. 98, 106 (2001). The argument in support of *certiorari* here is far less compelling than that unsuccessfully urged in *Nurre*. This is not an instance in which the school purported to allow students to express themselves, a circumstance that gives rise to students' free speech rights. A school concert, absent very unusual circumstances not presented here, does not offer students an "open mike." There was no

4. The question presented was:

> Does the censorship of a student-selected, instrumental-only performance of 'Ave Maria' within a limited public forum at a high school graduation ceremony violate the First Amendment's Free Speech Clause?

opportunity for students to choose the musical play list and, thus, no need for administrators to review and veto their choice. There was no public forum of any kind.

For these reasons, the Court of Appeals opinion presents no issues warranting review by this Court.

POINT II

THE PANEL'S DECISION DOES NOT CONFLICT WITH DECISIONS FROM THIS COURT OR OTHER CIRCUIT COURTS

Petitioner asserts that the Third Circuit's decision conflicts with the controlling principles in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Edwards v. Aguillard*, 482 U.S. 578 (1987); and *Epperson v. Arkansas*, 393 U.S. 97 (1968). Petition at 11-12. It does not. It is difficult to ascertain anything in *Santa Fe* that supports Petitioner, let alone that is contrary to the decision here. Both *Epperson* and *Edwards* contain language typical of Establishment Clause jurisprudence – that a statute's principal or primary effect must be one that neither advances nor inhibits religion – but are otherwise entirely inapposite, holding that the Creationism Acts there at issue were facially invalid because they lacked a clear secular purpose. At issue in *Church of the Lukumi Babalu Aye*, was "the principle that government may not enact laws that suppress religious belief or practice." 508 U.S. at 520. That principle is inapposite here.

Nor does the Third Circuit decision conflict with the decisions of other circuit courts. The cases cited by Petitioner in support of this contention, *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995); *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir. 1980); and *Bauchman v. W. High Sch.*, 132 F.3d 542 (10th Cir. 1997), address an entirely different issue. Petitioner describes those cases as holding that "the performance of traditional Christmas music in the public schools is not prohibited by the Constitution." *See* Petition at 12. This case has never presented that issue and the Third Circuit did not decide it. *See* App. 3a. ("The issue before us is whether a School District, in order to maintain a policy of complete religious neutrality, may prohibit celebratory religious music at school-sponsored events."). The principle upheld in those cases, the Third Circuit correctly recognized, "is far different from holding that the First Amendment compels a school district to permit religious holiday music or risk running afoul of the First Amendment." App. 18a. Thus, the purported conflict arises only from a mischaracterization of this case and its holding.

Our federal courts have universally upheld the rights of local school districts to exercise their discretion in an effort to avoid becoming embroiled in Establishment Clause disputes. *See, e.g., DeNooyer v. Livonia Pub. Schs.*, 799 F. Supp. 744 (E.D. Mich. 1992), *aff'd sub nom DeNooyer v. Merinelli*, 1 F.3d 1240 (6th Cir. 1993) and 12 F.3d 211 (6th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994) (school district's desire to avoid Establishment Clause violation could be compelling reason to support content-based ban on religious speech); *Walz v. Egg Harbor Twp. Bd. Of Educ.*, 342 F.3d 271 (3d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004) (public school district has wide discretion

in controlling school-sponsored expressive activities; "[d]etermining the appropriate boundaries of student expression is better handled by those charged with educating youth"); *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989); *Stein v. Oshinsky*, 348 F.2d 999 (2nd Cir. 1965), *cert. denied*, 382 U.S. 957 (1965) ("[d]etermination of what is to go on in public schools is primarily for the school authorities;" school acted well within its powers in concluding that student prayer must take place outside of school hours and functions).

POINT III

POLICY 2270, AS WRITTEN AND ENFORCED, IS NEUTRAL TOWARD AND DOES NOT DISFAVOR RELIGION

The arguments set forth in Points II and III of plaintiff's Petition are based upon fundamental misstatements of the factual record. Plaintiff characterizes the decision below as a complete ban on the performance of religious music at year-end concerts in the South Orange-Maplewood school system. This portrayal of the School District's decision allows plaintiff to argue that "singl[ing] out religious music for disfavored treatment [merely] because it is religious" amounts to "unconstitutional hostility toward religion." Petition at 13. Plaintiff cites *Lynch v. Donnelly*, 465 U.S. 668 (1984) for the proposition that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any," implying that the asserted complete ban on the performance of religious music is unconstitutional. Petition at 13.

Plaintiff's "hostility" and "lack of accommodation" argument is undercut by the actual undisputed facts. They reveal a balanced discretionary decision by a school district which sought to accommodate the religious viewpoints of all students in its diverse school population, while attempting to avoid Establishment Clause problems. Far from excising religious music from the South Orange-Maplewood curriculum, the School District's actions reflect nothing more than a good faith effort to accommodate all viewpoints and this Court's First Amendment jurisprudence.

Despite Petitioner's claims to the contrary, the School District's decision to interpret Policy 2270 as written did not arise out of any anti-religious agenda or animus, but rather an effort to maintain religious neutrality. (School District action taken "in order to maintain a policy of complete religious neutrality"). App. 3a. It realized that the District's student body and the community it served had become far more diverse in recent years; that the concerts inevitable focus on Christmas songs offended some participants and parents; and that balancing the concert play list so as to please all was, at best, a difficult task. These concerns, rather than violating the Establishment Clause, are of the "very type" that underlie Establishment Clause jurisprudence generally – the need for government neutrality toward religious institutions and beliefs and for respecting religious diversity. App. 14a; *citing*, *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005), and *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

The suggestion that the decision below will "pave the road for removing all religious references from

official recognition simply because they represent religion" is baseless hyperbole, particularly in view of the fact that religious music remains a central part of not only the music curriculum in the South Orange-Maplewood School District but also its year-end concerts. Petition at 15. Petitioner's assertions arise from the conflation of religious neutrality with religious animosity. Stratechuk views every action that reduces the role of religion in the public sphere as antireligious and therefore an Establishment Clause violation. There is in Petitioner's world view no position of neutrality toward religion, only supporters or opponents. This Court has rejected that approach, recognizing the difference between neutrality and hostility. *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). Indeed, neutrality towards religion is the paradigm under the Establishment Clause. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973); *Epperson v. Arkansas*, 393 U.S. 97 (1968). What Petitioner seeks is not neutrality but a rule requiring both that religion be promoted to the maximum extent possible and that the current role of religion be frozen in place, insulated from any diminution. But just as school districts can determine how close to the "Establishment Clause line" they wish to place themselves, they are free to change, in either direction, the spot they have previously chosen.

Petitioner essentially argues that true neutrality towards religion requires this Court to declare that the First Amendment mandates that traditional Christmas carols be performed at year-end concerts in South Orange-Maplewood, simply because that had been the tradition in the School District for many years. He

contends that, because in decades past school concerts included celebrations of Christmas, the Constitution *mandates* that Christmas be celebrated in the South Orange-Maplewood school district each year. Stratechuk has not cited to a single decision in support of his claim that the First Amendment mandates that Christmas be celebrated in the public schools of this country. Of course, no federal court has gone so far as to suggest that our First Amendment jurisprudence could support such a result.

POINT IV

THIS CASE, REPRESENTING AS IT DOES A MODEL OF RELIGIOUS NEUTRALITY AND BALANCING OF FIRST AMENDMENT CONCERNS, IS NOT AN APPROPRIATE VEHICLE FOR CLARIFYING THIS COURT'S FIRST AMENDMENT JURISPRUDENCE

In Point IV, Petitioner argues that this case presents the Court with the opportunity to clarify its jurisprudence by reviewing, for the first time, a case involving disfavor of religion. Petition at 23. As heretofore noted, the factual predicate for this argument is missing. As a matter of undisputed fact and law, the decisions below cannot be read as hostile to or disfavoring religion. Instead, the District Court and the Third Circuit decisions reflect appropriate judicial deference to a school district's broad discretionary right to decide matters affecting the school curriculum. They further respect a school district's discretionary right to attempt to avoid Establishment Clause problems by adopting a "truly" neutral policy toward religion in the schools. Policy 2270 permits the study of religious music as part of the curriculum, permits the performance of

religious music (including celebratory religious music in the classroom) and permits the performance of religious music at school-sponsored concerts, as long as the music pieces are reasonably related to the curriculum and are not directly associated with the celebration of religious holidays.

Petitioner's argument ignores the simple fact that Policy 2270, as currently interpreted, is constitutionally neutral because it bans celebratory religious music which could be perceived, by the reasonable objective observer, as governmental endorsement of religion and of Christianity in particular. The only religious music that is banned are those pieces that are directly associated with the celebration of religious holidays.

Since the factual predicate of plaintiff's argument in favor of *certiorari* is not supported in the record, this Court need not and should not entertain this case as a vehicle for revisiting its First Amendment jurisprudence interpreting the Establishment Clause.

CONCLUSION

Under the *Lemon* test, the coercion test, or any other recognized test for evaluating Establishment Clause claims, it is inconceivable that this Court would rule that the First Amendment *requires* that Christmas, Hanukkah or any other religious holiday be celebrated in the public schools of this country. For this reason, among the others cited, this Court should deny the Petition for *Certiorari*.

Respectfully submitted,

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